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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 115

ROLAND H. DEL MAR AND THE RIGGS NATIONAL BANK OF WASHINGTON, D. C., AS EXECUTORS OF THE ESTATE OF CHARLES DELMAR, DECEASED, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No.

ROLAND H. DEL MAR AND THE RIGGS NATIONAL BANK OF WASHINGTON, D. C., AS EXECUTORS OF THE ESTATE OF CHARLES DELMAR, DECEASED, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Roland H. Del Mar and The Riggs National Bank of Washington, D. C., as Executors, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit dated January 9, 1968, which affirmed a judgment of the United States District Court for the District of Columbia dated March 7, 1967.

CITATION TO OPINION BELOW

The District Court entered its judgment without written opinion. The opinion of the Court of Appeals, printed in Appendix B, *infra,* has not as yet been officially reported.

JURISDICTION

The judgment of the United States District Court for the District of Columbia was entered on March 7, 1967 (R. 1a—p. 13),* the judgment of the United States Court of Appeals for the District of Columbia, affirming the lower Court, was entered on January 9, 1968 (R. 3); petition for rehearing *en banc* (R. 4) was denied by a majority of the active Judges of that Court by order dated February 21, 1968 (R. 5); by order of that Court filed March 7, 1968, the Clerk of the Court was directed to stay the transmittal of the Court's opinion and judgment for a period of thirty days (R. 7); and by order of that Court filed April 1, 1968, such stay was extended to the end of the period permitted by law for filing a petition for certiorari (R. 9).

The jurisdiction of this Court is invoked under 28 U.S.C., section 1254(1).

QUESTIONS PRESENTED

(1) Did the Congress, in enacting the marital deduction provision of the Federal estate tax law, intend that estates of District of Columbia intestate decedents should *not* receive the maximum tax equalization benefit provided for or, having intended otherwise, fail to achieve its purpose;

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*"a" refers to the Joint Appendix in the Court of Appeals below, which Appendix has been certified and filed with the petition as a part of the official record.

(2) Do the local statutes involved, dealing with estates of intestate decedents, necessarily treat the Federal estate tax as a "debt" to be set off before determination of the *amount* of the statutory "surplus" in which the surviving spouse shares; and

(3) Does a determination, with respect to estates of District of Columbia intestate decedents, that a local statute enacted by Congress in 1901 prevents realization of the full benefit of the marital deduction, raise serious question as to the Constitutionality of that tax provision?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions involved are clauses 1 and 17 of section 8 of Article I of the Constitution. The statutory provisions involved are 26 U.S.C., section 2056 (and in more particular, the provisions of paragraph (4)(A) of subdivision (b) thereof) and the District of Columbia Code (1961 Ed.), sections 18-211(e), 18-701, 18-703 and 49-304. All are printed in Appendix A, *infra*.

STATEMENT

Charles Delmar, a resident of Washington, D. C., died testate on August 17, 1963 survived by a widow and one son. The surviving spouse renounced the terms of her husband's will by exercising her option under District of Columbia Code, section 18-211 (1961) and took one-third of the "surplus" of the estate under District of Columbia Code, section 18-703 (R. 1a—pp. 14-15).

In computing the estate tax, petitioners proceeded on the theory that the amount of property which the

widow received by her election, and thus the amount eligible for the marital deduction provided for in the Federal tax law, was a portion of an amount remaining after the payment of estate taxes (R. 1a—p. 6 and R. 2). Upon being advised that they had proceeded upon an erroneous basis, petitioners filed a claim for refund on the basis that the amount otherwise constituting the allowable marital deduction should not be reduced by such tax (R. 1a—pp. 15-16).

With the denial of such claim by the District Director of Internal Revenue, petitioners filed a timely Complaint in the United States District Court for the District of Columbia, Civil Action File No. 2603-66, for refund of an appropriate portion of the Federal estate tax paid R. 1a—p. 4). Cross-Motions for Summary Judgment were subsequently filed as to which the Court, without written opinion, denied the motion of petitioners, granted the motion of the defendant and entered its order and judgment (R. 1a—pp. 10, 12, 13).

A timely appeal was filed with the United States Court of Appeals for the District of Columbia Circuit. On January 9, 1968 that Court, in a *per curiam* opinion, Circuit Court Judge Robinson *not* participating, affirmed the decision of the Court below (R. 2).

The instant proceeding being a civil action against the United States for the recovery of an internal-revenue tax alleged to have been erroneously assessed and collected, the Court of first instance was possessed of original jurisdiction under Title 28 U.S.C., section 1346(a)(1).

ARGUMENT

(1)

The Court Below Improperly Determined That the Congress, in Enacting the Marital Deduction Provision of the Federal Estate Tax Law, Did Not Intend That Estates of District of Columbia Intestate Decedents Should Receive the Full Benefit From That Provision

From the enactment of the original Federal estate tax in 1916 until the Revenue Act of 1942, estates of decedents in community property states enjoyed a most favored position estate-taxwise. In those states, only half of the community property belonged to one spouse and *hence* only one-half was subjected to the estate tax at death of the first spouse. Since the tax has sharply progressive rates and provides for a substantial exemption, the consequence, as noted in the House Report (H. Rept. No. 2333, 77th Cong., 1st Sess. (1942-2 C.B. 372, 401)), was an estate tax savings in community property states which amounted to as much as $485,000 in the case of a $5 million estate and to as much as $1,171,000 where a $10 million estate was involved. In 1942, the Congress attempted to produce more equal results by equating the tax base in community property states with that in common law states. Such legislation, said S. Rept. No. 1631, 77th Cong., 2nd Sess. (1942-2 C.B. 504, 673), "eliminates special estate tax provileges enjoyed by virtue of the community property system." By the legislation adopted, the *entire* community property was treated as the taxable estate of the first spouse to die which was the same basis on which the estate tax was determined in common law states.

"Unfortunately, the 1942 amendments did not produce complete geographical equalization" and resulted

in some instances in a heavier tax in the community property states than in the common law states. H. Rept. No. 1274, 80th Cong., 2nd Sess. (1948-1 C.B. 241, 260). As the result, the Congress in 1948 repealed the 1942 legislation thereby restoring the pre-1942 estate tax position in community property states. However, in a *second* attempt to provide for the desired geographical tax equalization, the Congress, to equate the tax base in common law states with that so restored in the community property states, adopted a diametrically different approach, *i.e.*, "a splitting technique" with respect to all property *other than* community property.

With respect to the "splitting" provisions adopted for Federal estate and gift tax purposes by the Revenue Act of 1948, H. Rept. No. 1274, 80th Cong., 2nd Sess. (1948-1 C.B. 241, 244), states that:

> "* * * In effect, these amendments represent the adoption of a *new national system for ascertaining Federal estate and gift tax liability.* * * * (Italics supplied.)

and (*ibid.*, p. 261) that:

> "* * * In the case of the estate tax, 'splitting' means an *exemption** in common-law States of up to one-half of the decedent's estate if it passes outright to the surviving spouse. * * *" (Italics supplied.)

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* substantially so treated in *In re Estate of Rooney*, 186 Kan. 200, 349 P. 2d 916 (1960), as to which see *First National Bank of Topeka, Kansas* v. *United States*, 233 F. Supp. 19, 28-29 (D.C. Kan. 1964). Taxpayer submits that the term "exemption" is particularly descriptive of the Congressional intention with respect to the District of Columbia.

It is incontrovertible, therefore, that the Congress legislated to the end that insofar as *it* could be responsible therefor, there would be uniform estate tax treatment for residents of common law and community property states for the purpose of correcting inequities and *to provide for tax equalization.* S. Rept. No. 1013, 80th Cong., 2nd Sess. (1948-1 C.B. 285). This intent has been repeatedly recognized by this Court. Thus, in *United States* v. *Stapf,* 375 U.S. 118, 128 (1963), the Court stated as follows:

> "* * * The 1948 tax amendments were *intended to equalize the effect of the estate taxes in* community property and common-law *jurisdictions.* Under a community property system, such as that in Texas, the spouse receives outright ownership of one-half of the community property and only the other one-half is included in the decedent's estate. To equalize the incidence of progressively scaled estate taxes *and to adhere* to the patterns of *state* law, *the marital deduction permits* a deceased spouse, subject to certain requirements, *to transfer free of taxes one-half* of the non-community property *to the surviving spouse. * * * the primary thrust of this is to extend* to taxpayers in common-law States *the advantages* of 'estate splitting' otherwise available only in community property States. * * *" (Italics supplied.)

The Court in *Jackson* v. *United States,* 376 U.S. 503, 510 (1964), stated that:

> "* * * the general *goal* of the marital deduction provisions was to *achieve uniformity* of *federal estate tax impact* between those States with community property laws and those without them. * * *" (Italics supplied.)

In *Northeastern Pennsylvania National Bank & Trust Company* v. *United States,* 387 U.S. 213, 18

L. ed. 2d 726, 731, 732 (1967), this Court, in the following language, reiterated that Congressional purpose:

> "* * * The deduction [marital] was enacted in 1948, and the underlying *purpose* was *to equalize the incidence of the estate tax* in community property and common-law *jurisdictions.* Under a community property system a surviving spouse takes outright ownership of a half of the community property, which therefore is not included in the deceased spouse's estate. *The marital deduction allows transfer* of up to one-half of noncommunity property *to the surviving spouse free of the estate tax.* * * *
>
> * * *
>
> "Congress' *intent* to afford a liberal 'estate-splitting' possibility to married couples, where the deductible half of the decedent's estate would ultimately—if not consumed—be taxable in the estate of the survivor, *is unmistakable.* * * *" (Italics supplied.)

Since the share of the surviving spouse in community property jurisdictions was not subjected to the estate tax, the Congress, *insofar as was within its power,* could *only* have intended to free from tax the share of the surviving spouse in common law jurisdictions.*

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* While not precisely germane to the decision in this case, it may be noted that 23 states (including Maryland and Virginia) have adopted tax apportionment legislation freeing the marital deduction share from the tax burden; that the courts of 10 others, without legislative assistance, have adopted the general rule of equitable apportionment; and in 4, there is neither statute nor decision bearing on the problem. Also to be noted is the recommendation in 1958 of the National Conference of Commissioners on Uniform State Laws that a Uniform Estate Tax Apportionment Act (freeing the marital deduction share from tax) be adopted by all of the states.

See *In re Estate of Collins,* 269 F. Supp. 633 (D.C. D.C. 1967), which relies on the last cited decision of this Court and on *Pitts* v. *Hamrick,* 228 F. 2d 486 (4 Cir. 1955), *Dodd* v. *United States,* 345 F. 2d 715 (3 Cir. 1965), *Hammond* v. *Wheeler,* 347 S.W. 2d 884 (Mo. 1961), *Lincoln Bank & Trust Co.* v. *Huber,* 240 S.W. 2d 89 (Ky. 1951) and *Gesner* v. *Roberts,* 225 A. 2d 697 (N.J. 1967).

With the foregoing in mind, how are we then to read subsection (b)(4)(A) of section 2056 which provides that for purposes of determining the value of any interest in property passing to the surviving spouse, "there shall be taken into account the effect" which the Federal estate tax "has on the net value to the surviving spouse of such interest." Obviously, it is *not* to be read with the self-defeating purpose that the share of the surviving spouse *shall* be burdened by the tax (Whittaker and Whittaker, *Equitable Apportionment of the Federal Estate Tax—The Marital Deduction,* 31 Univ. of Kansas City Law Review 266, 267 (1963)) for such is utterly foreign to the basic statutory purpose. It is to be read, petitioners submit, in light of the Constitutional limitations upon the power of Congress and the Congressional purpose to fit such limitations into the scope of the taxing statute.

This Court has stated that "the right to regulate succession is vested in the states and not in Congress" (*Knowlton* v. *Moore, infra,* at p. 58) and the right of a testator to provide for distribution of his estate is derived from the *state. New York Trust Co.* v. *Eisner,* 256 U.S. 345 (1921). In light of these principles, the Congress, in imposing the Federal estate tax, has never undertaken, with respect to *probate* property, to specify in any manner who was to bear the tax burden. *Riggs*

v. *Del Drago,* 317 U.S. 95, 98 (1942). Indeed, by reason of the powers reserved to the states by the Tenth Amendment to the Constitution, the Congress is powerless, as to them, to cause the share of the surviving spouse to pass free of the tax burden. *Wachovia Bank and Trust Co.* v. *Green,* 236 N.C. 654, 695, 73 S.E. 2d 879, 883 (1953).

Thus, by section 2056(b)(4)(A), the Congress merely recognized that in the common law states, the quantum of property passing to the surviving spouse *necessarily* depended on whether, under *state* law, such share was burdened with a portion of the tax and provided that *if* it were so burdened, the amount of the marital deduction should be appropriately reduced. Stated in another way, that subsection merely provides that where the purpose of Congress cannot be achieved because of state law burdening the share of the surviving spouse with part of the tax, such amount of tax shall be taken into account in determining the amount of the marital deduction.

It is submitted, therefore, that the statute, as a whole, must be read as a *directive* that in common law jurisdictions, the share of the surviving spouse, as in community property states, *shall* pass free of tax *except* where achievement of this result is beyond the power of the Congress.

Utterly consistent with this view is the legislative history of subsections (c) and (d) of section 826, 1939 Code (sections 2206 and 2207, 1954 Code). In each of those subsections, the Congress, prior to 1948, had originally provided (S. Rept. No. 1613, 77th Cong., 2nd Sess. (1942-2 C.B. 504, 675)) for a "fair and equitable apportionment of the tax burden attributa-

ble" to insurance and appointive property regardless of to whom it went. With the enactment of the marital deduction provision in 1948, however, the Congress expressly provided, on a uniform and national basis, *against* any such apportionment to those assets *to the extent that* such property qualifies for the marital deduction. It is submitted that this is consistent only with a Congressional intent that to the extent *it* was responsible for any rule of apportionment, *it* intended to provide *against* liability to the surviving spouse where the marital deduction was involved.

Resolution of the question here involved is a matter of discovering whether it was the intent of Congress, with respect to District of Columbia intestate decedents, that the share of the surviving spouse should not be burdened with a portion of the tax so as to permit full achievement of the "opportunity for equalization" otherwise extended to the several states—and of further ascertaining whether, such being that intent, the Congress failed to achieve its purpose.

The decision of the Court below literally contradicts the above-cited decisions of this Court that the intent of Congress was to equalize the effect of estate taxes in community property and common law *jurisdictions.* While it recognizes that the Congress "adopted the marital deduction to provide opportunity for equalization of the tax treatment of estates in common law and community property *states,*" it questions whether "the marital deduction provision of the tax law reflects a policy that Congress considers applicable to govern local law in the District of Columbia". It continues that "If" it does, "Congress can easily provide a remedy." Thus, in essence, the position of the Court below may be said to be that while the Congress, "the

national legislature," provided, on a uniform basis, "opportunity for equalization of the tax treatment" throughout the entire United States, the Congress, in its role as the legislative body for the District of Columbia, has made no attempt to *create* for *that* jurisdiction the "equalization" which, by the marital deduction provision, it had "made possible." Stated in another way, the Court below, in essence, ruled that the unmistakable intent of Congress to permit transfer free of tax of up to one-half of the property of a deceased spouse is impossible of attainment within the District, in the case of intestacy, without further local legislation by Congress specifically so providing—and that the tax equalization concern expressed by the Congress, insofar as the District is concerned, was expressed in "self-defeating terms." *Cf. United States* v. *Shirey,* 339 U.S. 255, 260 (1959).

That Congress did not *expressly* spell out that adoption of the new *national* system for ascertaining the Federal estate tax liability should be applicable in the District of Columbia is immaterial. It is a cardinal rule of statutory construction that that which arises by plain and clear implication from legislation is as much a part thereof "as if the implication had been embodied in so many words." See *McHenry* v. *Alford,* 168 U.S. 651, 672 (1898) and *Wilson County* v. *Third National Bank of Nashville,* 103 U.S. 770, 778 (1881). This has even been recognized by the Court below in *Hepburn* v. *Winthrop,* 83 F. 2d 566, 572 (1936) where the decision was predicated upon the "necessary implications" of the Federal estate tax law.

The Legislature, it is submitted, has the power to decide what the *policy* of the law shall be, and if it has intimated its will, however indirectly, that will must be

recognized and obeyed by the courts.* This principle is recognized in *United States* v. *Union Pacific Railroad Co.*, 353 U.S. 112, 118 (1957), where the Court stated that "It will not do for us to tell the Congress 'We see what you were driving at but you did not use choice words to describe your purpose.'" Yet the position of the Court below with respect to the problem here presented is precisely to the contrary, as to which this Court, in another setting, has characterized as not being an adequate discharge of its duty. *Minnesota Mining and Manufacturing Co.* v. *North Jersey Wood Finishing Co.*, 381 U.S. 311, 321 (1965):

(2)

The Court Below Improperly Determined That the Federal Estate Tax Is a "Debt" Which Must be Set Off Before Determination of the Amount of the Statutory "Surplus" in Which the Surviving Spouse Shares Under District of Columbia Law

While recognizing the basic purpose of the Congress in enacting the marital deduction provision, the Court below expresses disagreement "that this purpose of the tax law modifies the meaning of a long-standing local statute wherein Congress provided that in the District of Columbia a dissenting widow would take one-third of the surplus after debts." Inherent in this position is the proposition that the estate tax *is* and *always has been* a "debt" to be set off before the amount of the "surplus" can be determined and that this being true, the meaning neither of "debt" nor "surplus" was changed by the marital deduction legislation.

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* as it was by Judge McGarraghy in *In re Estate of Collins*, *supra*, involving precisely the question here presented and reaching a contrary result.

While the Court below has previously held that the estate tax "is not a debt" (*Hepburn* v. *Winthrop, supra,* at p. 573), as to which see also *Bigoness* v. *Anderson,* 106 F. Supp. 986, 987 (D.C. D.C. 1952), the basic question is the relation of that tax to the meaning of the statutory term "surplus" in which the surviving spouse shares. In this respect, the legislative history of the District of Columbia Code and an appreciation of the background at the time of its original enactment affords illumination.

"Original" Meaning of "Surplus"

As originally enacted in 1901 (31 Stat. 1189-1436), the Congress, in dealing with the administration of District of Columbia estates, provided, under chapter 854 (sections 364 and 365*), for an accounting of every executor and administrator. More specifically, it was provided that "[I]n such account shall be stated, on the one side, the assets which have come to his hands" while "[O]n the other side shall be stated the disbursements by him made, namely: First. Funeral Expenses * * *. Second. The debts of the deceased * * *. Third. The allowance for things lost * * *. Fourth. His commissions. Fifth. His allowance for costs, attorney's fees and extraordinary expenses which the Court may think proper to allow." That the excess of the "asset" side over the "other side" constituted the "surplus," referred to in chapter 854 (section 373** *et seq.*), is reasonably clear.

That in the determination of the "surplus" *no deduction was to be made for death taxes* is also clear

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* D.C. Code sections 20-604 and 20-605 (1961 Ed.).

** D.C. Code section 18-701 (1961 Ed.).

and the reason therefor is evident. At the time of the enactment of that Code (1901), there existed no Federal or District estate tax. While the Spanish War Revenue Bill of 1898 (30 Stat. 448, 464-466) provided for a Federal graduated inheritance tax on transfers of personal property, express provision was made (section 29, Fifth) that "all legacies or property passing by will, or by the laws of any State or Territory, to husband or wife of the person died possessed [of property], as aforesaid, shall be exempt from tax or duty." It is evident, therefore, that in providing for the widow's share in the "surplus" of an intestate estate in the District of Columbia, Congress legislated in 1901 with the view in mind that her share would bear *no* death duty*—and that the amount of the "surplus" was to be determined *before* any death tax.

Meaning of "Surplus" 1916-1948

The enactment of the Federal Estate Tax Act of 1916 (39 Stat. 777) created a new situation to which the local intestate statutes had to be adapted. Two approaches *could* have been made, *either* of which would have reached the *same* result.

Under the first approach, *all* parts of an intestate estate *then* having been subjected to the tax, it is possible that the original meaning of the word "surplus", *i.e.,* an amount determined before death tax, was retained. Under this approach, the "surplus" having been determined and divided as provided for by local statute, the Federal estate tax was *then* set off against each share *before* distribution and in the proportion that each share contributed to the tax. Such would have been in keeping with the general rule of

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* *Cf. Merchants National Bank & Trust Company of Indianapolis* v. *United States,* 246 F. 2d 410, 414 (Fn. 8) (7 Cir. 1957).

statutory construction that a statute is to be construed as it was intended to be understood when passed. *Cf. United States* v. *Stewart,* 311 U.S. 60, 69 (1940).

Under the second approach, it is possible that the situation was met by considering the meaning of the word "surplus" to have been modified in order to meet the estate tax imposition—*i.e.,* that "surplus" *thereafter* meant an amount determined after the tax. Such approach *could* have been made by giving effect to section 1639 of the District of Columbia Code, enacted March 30, 1901 (31 Stat. 1189, 1436), today contained as a note to section 49-304, District of Columbia Code (1961 Ed.), which provides that insofar as any Act of Congress passed after enactment of the Code "may vary from or conflict with any provision contained in this Code, they are to have effect as subsequent statutes and as repealing any portion of this Act inconsistent therewith." Which approach, *if either,* was consciously adopted is unknown, since there is neither published ruling nor judicial decision on the point.

Thus, the 1916 estate tax law having made a new exaction, which necessarily had to be provided for in the local statutory scheme, the term "surplus" *could* have retained its original meaning or *could* have been modified on the second approach to the extent of any then resulting inconsistency by treating the estate tax as being in the nature of an administration expense (*Cf. Hepburn* v. *Winthrop, supra*) since it obviously was *not* a debt of the decedent.

Meaning of "Surplus" 1948 to Date

If, as the result of the Federal Estate Tax Act of 1916, the meaning of the word "surplus" was considered *not* to have been changed from that with which

it was originally enacted, then there exists today no reason to change it, and the surviving spouse's share therein is to be determined before any estate tax. *If*, however, as the result of the 1916 Act, the meaning of the term *was* changed (by application of section 1639 of the District of Columbia Code enacted in 1901) to avoid an inconsistency with the subsequent general legislation, then there is every reason to *again apply* a changed meaning to conform with the intent, the purpose and the "necessary" implications of the Federal estate tax law subsequently enacted by the Congress in 1948. That subsequent legislation not inapplicable to the District may thus modify a previous statute of but local application has been recognized by this Court (*Page* v. *Burnstine,* 102 U.S. 664, 666-667 (1881)), by the Court below (*Jordan* v. *United States,* 93 U.S. App. D.C. 65, 207 F. 2d 28 (1953)) and by the local District Court. *First National Bank of Colorado Springs, Colorado* v. *United States,* 30 F. Supp. 730, 731 (1939) and *Broden* v. *Bowles,* 35 F.R.D. 13, 16 (1964). This latter Code provision, however, is disregarded by the Court below.

In any event, the courts should not seek to resolve the question of the estate tax burden on the widow's share solely by reference to the technical definition of the words employed in the local statute defining that share, "particularly where the statute was enacted prior to the adoption of the marital deduction provision in 1948." Kahn, *The Federal Estate Tax Burden Borne By A Dissenting Widow,* 64 Mich. Law Review 1499, 1522 (1966) and see *Merchants National Bank & Trust Company of Indianapolis* v. *United States, supra* (Fn. 8).

(3)

A Determination That With Respect to Estates of District of Columbia Intestate Decedents, a Local Statute Previously Enacted by the Congress Prevents Realization of the Full Benefit of the Marital Deduction Raises Serious Question as to the Constitutionality of the Tax Provision

While Congress with respect to the District of Columbia, under clause 17, section 8, of Article I of the Constitution, is possessed of all powers of legislation which may be exercised by a state in dealing with its affairs, such power is *not* an unlimited one exercisable without reference to other provisions of the Constitution. *Atlantic Cleaners & Dyers, Inc.* v. *United States,* 286 U.S. 427, 434-435 (1932).

If, therefore, the local statutes involved mean what the lower Court said, thereby creating what even that Court recognized to be an "anomaly", *i.e.,* an irregularity or *lack of uniformity,* then in interpreting and applying the marital deduction provision this Court is faced with two points. First is the cardinal rule of statutory construction that of two possible interpretations of a statute, the one avoiding any question as to Constitutionality is to be preferred. A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also "to avoid doubts as to its validity." *Lucas* v. *Alexander,* 279 U.S. 573, 577 (1929). Doubts as to the Constitutionality of a statutory provision under one construction, stated this Court, "would require us to adopt the construction, at least reasonably possible here, which would uphold the Act." *Reinecke* v. *Northern Trust Company,* 278 U.S. 339, 348-349 (1929). Second is the "uniformity" limitation under clause 1, section 8, Article I of the Constitution, which, said this Court, was intended to prevent "the possible discrimination

against one or more states" and to "prevent Congress from having in their power to cause them [duties, imposts and excises] to fall very unequally and much heavier on some states than on others." *Knowlton* v. *Moore, infra,* pp. 89 and 106.

There can be no doubt but that the estate tax here involved is an excise. *Fernandez* v. *Wiener,* 326 U.S. 340 (1945). Nor can there be any doubt but that it is laid and collected to provide for the general welfare of the United States since, under section 7809 of the 1954 Code, all monies received with respect thereto shall be paid "into the Treasury of the United States." Accordingly, imposition of such tax, under the Constitutional provision cited, requires that such tax "shall be uniform throughout the United States"—which includes the District of Columbia. *Loughborough* v. *Blake,* 5 Wheat. (U.S.) 317, 319 (1820) and *Knowlton* v. *Moore,* 178 U.S. 41, 106-107 (1900). Indeed, "to put at rest all doubts regarding the applicability of the Constitution to the District of Columbia, Congress, by the act of February 12, 1871 (16 Stat. at L. 419, 426, chap. 62, § 34), specifically extended the Constitution * * * to this District." *Downes* v. *Bidwell,* 182 U.S. 244, 263 (1901).

It is established that the quoted language of the Constitution does not relate to the inherent character of the tax "as respects its operation on individuals, but merely requires that whatever plan or method Congress adopts for laying the tax in question, the same plan and the same method must be operative throughout the United States." That is to say, (*Knowlton* v. *Moore, supra,* at p. 84) "that wherever a subject is taxed anywhere, the same must be taxed everywhere throughout

the United States, and at the same rate." That lack of inherent uniformity (as is here possible) is due to divergent *state* laws, rather than to any provision of a Congressional enactment, does not defeat the existence of uniformity. *Phillips* v. *Commissioner,* 283 U.S. 589, 602 (1931), *Florida* v. *Mellon,* 273 U.S. 12, 17 (1927), *Poe* v. *Seaborn,* 282 U.S. 101, 117 (1930) and *Riggs* v. *Del Drago, supra,* at 102 (1942). The Congress, however, *is* prevented, by *its* own action, from providing a lack of potential inherent uniformity either of tax imposition or rate. Thus, it seems clear that the Constitution would prevent the Congress from levying a national excise tax of 10¢ a pound on the sale of tea but providing that the rate in the District of Columbia shall be 15¢.

The narrow question thus presented (by way of statutory construction) is whether there is a prohibited lack of uniformity in the imposition of a Federal estate tax if the Congress permits the tax base, and thus the rate and burden thereon, to be reduced in the several states by virtue of the application of their local law but prevents, either by direct action or failure to act, such reduction in the District of Columbia. Certainly, the Congress may not Constitutionally provide that the marital deduction shall be allowable in computing the estate tax liability of decedents in the several states with an express provision that such shall not be applicable in the District of Columbia. If this be sound, then surely the Congress may not Constitutionally provide that as to the states the base, and thus the amount, of the estate tax may be minimized by a maximization of an allowable marital deduction under local state law but provide a contrary rule for the District of Columbia. Thus, if Congress in enacting the marital deduc-

tion provision had concurrently therewith enacted a local statute providing that in no event may the share of the decedent's intestate estate passing to his surviving spouse pass free of the tax, it would seem that such provision would cause the national tax exaction provision to have an unconstitutional feature. *Yet* it is the position of the Court below that Congress did *indirectly* so provide by its failure to specifically revise local statutes adopted by it in 1901 considered by the lower Court to be controlling. Congress, however, may not Constitutionally do indirectly what it may not do directly (*United States* v. *Butler,* 297 U.S. 1, 68 (1936)) and this principle is equally applicable to the inhabitants of the District of Columbia. *O'Donoghue* v. *United States,* 289 U.S. 516, 539-541 (1933).

If, therefore, its failure to specifically provide, with respect to intestate estates of District of Columbia decedents, that the share of the surviving spouse, otherwise qualifying for the marital deduction, should pass free of the tax is as effective to prevent this result as would be direct legislation, the Constitutionality of the marital deduction provision is indeed subject to serious question which should be avoided by appropriate statutory interpretation and construction.

REASONS FOR GRANTING WRIT

The petitioners assert that a writ of certiorari should be granted in this cause under paragraph (b) of subsection (1) of Rule 19 of this Honorable Court because there is presented a novel question as to the interplay of two Congressional enactments, *i.e.,* the District of Columbia local law and the Federal tax statute, the one enacted 47 years after the other, and because the

United States Court of Appeals for the District of Columbia has—

(1) decided a Federal tax question in a way to conflict with applicable decisions of this Court as to the Congressional intent;

(2) decided an important question as to the applicability of the Federal estate tax law to District of Columbia intestate estates which has not been, but should be, specifically settled by this Court;

(3) decided, in relation to the Federal estate tax law, an important District of Columbia question, *i.e.*, the meaning of the statutory term "surplus," contrary to the meaning with which such term was originally enacted in a local statute;

(4) disregarded, in its Decision, the provision of the District of Columbia Code providing that a statute only locally applicable is modified by a subsequent Congressional enactment of general application to the extent any inconsistency is created; and

(5) by its Decision, raised serious question as to the Constitutionality of the marital deduction provision of the Federal estate tax law.

CONCLUSION

WHEREFORE, petitioners pray that a Writ of Certiorari may issue under the seal of this Honorable Court in this cause directed to the United States Court of Appeals for the District of Columbia Circuit; and upon such review, the judgment of said Court of Appeals for the District of Columbia Circuit be vacated,

reversed and set aside; and that this cause be remanded to said Court with instructions to proceed further in accordance with the views of this Court.

Respectfully submitted,

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